

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 CLAY LIESEGANG,

Case No.: 3:19-cv-00685-MMD-WGC

4 Plaintiff,

Order

5 v.

6 MIKE YOUNG,
7 WHITNEY PEAK,

8 Defendants.

9
10 Plaintiff is an inmate incarcerated in the Nevada Department of Corrections (NDOC), and
11 housed at Lovelock Correctional Center (LCC). He filed an application for leave to proceed in
12 forma pauperis (IFP), pro se complaint and motion for appointment of counsel on November 12,
13 2019. (ECF Nos. 1, 1-1, 2.) On December 13, 2019, the court issued an order noting that each of
14 Plaintiff's filings were fillable forms and at the top Plaintiff included the court name as the Sixth
15 Judicial District Court of the State of Nevada in and for the County of Pershing, but the documents
16 were filed in the United States District Court for the District of Nevada. The court gave Plaintiff
17 30 days to file a notice indicating whether he intended to file this action in the United States District
18 Court of the District of Nevada, or whether he intended to file it in the State court. If the former,
19 the court instructed Plaintiff to also file a financial certificate along with an IFP application on the
20 court's provided form. The court gave Plaintiff 30 days to submit these filings. (ECF No. 3.)

21 On January 17, 2020, Plaintiff filed a new application to proceed IFP with the financial
22 certificate, complaint and motion for appointment of counsel. (ECF Nos. 5, 5-1, and 5-2.)

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1 **I. IFP APPLICATION**

2 A person may be granted permission to proceed IFP if the person “submits an affidavit that
3 includes a statement of all assets such [person] possesses [and] that the person is unable to pay
4 such fees or give security therefor. Such affidavit shall state the nature of the action, defense or
5 appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1).

6 The Local Rules of Practice for the District of Nevada provide: “Any person who is unable
7 to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The
8 application must be made on the form provided by the court and must include a financial affidavit
9 disclosing the applicant’s income, assets, expenses, and liabilities.” LSR 1-1.

10 “[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some
11 particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
12 (quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the
13 benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

14 An inmate submitting an application to proceed IFP must also “submit a certificate from
15 the institution certifying the amount of funds currently held in the applicant’s trust account at the
16 institution and the net deposits in the applicant’s account for the six months prior to the date of
17 submission of the application.” LSR 1-2; *see also* 28 U.S.C. § 1915(a)(2). If the inmate has been
18 at the institution for less than six months, “the certificate must show the account’s activity for this
19 shortened period.” LSR 1-2.

20 If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount
21 of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an
22 initial partial filing fee that is calculated as 20 percent of the greater of the average monthly
23 deposits or the average monthly balance for the six-month period immediately preceding the filing

1 of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid, the
2 prisoner is required to make monthly payments equal to 20 percent of the preceding month's
3 income credited to the prisoner's account. 28 U.S.C. § 1915(b)(2). The agency that has custody of
4 the prisoner will forward payments from the prisoner's account to the court clerk each time the
5 account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

6 Plaintiff's certified account statement indicates that his average monthly balance for the
7 last six months was \$1.50, and his average monthly deposits were \$36.21.

8 Plaintiff's application to proceed IFP is granted. Plaintiff is required to pay an initial partial
9 filing fee in the amount of \$7.24 (20 percent of \$36.21). Thereafter, whenever his prison account
10 exceeds \$10, he must make monthly payments in the amount of 20 percent of the preceding
11 month's income credited to his account until the \$350 filing fee is paid.

12 **II. SCREENING**

13 **A. Standard**

14 Under the statute governing IFP proceedings, "the court shall dismiss the case at any time
15 if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal--
16 (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii)
17 seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.
18 § 1915(e)(2)(A), (B)(i)-(iii).

19 In addition, under 28 U.S.C. § 1915A, "[t]he court shall review, before docketing, if
20 feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in
21 which a prisoner seeks redress from a governmental entity or officer or employee of a
22 governmental entity." 28 U.S.C. § 1915A(a). In conducting this review, the court "shall identify
23 cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--

1 (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks
2 monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b)(1)-(2).

3 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
4 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and
5 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a
6 complaint under these statutes, the court applies the same standard as is applied under Rule
7 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule
8 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232
9 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

10 The court must accept as true the allegations, construe the pleadings in the light most
11 favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*,
12 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are “held to less
13 stringent standards than formal pleadings drafted by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9
14 (1980) (internal quotation marks and citation omitted).

15 A complaint must contain more than a “formulaic recitation of the elements of a cause of
16 action,” it must contain factual allegations sufficient to “raise a right to relief above the speculative
17 level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading must contain
18 something more ... than ... a statement of facts that merely creates a suspicion [of] a legally
19 cognizable right of action.” *Id.* (citation and quotation marks omitted). At a minimum, a plaintiff
20 should include “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570;
21 *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

22 A dismissal should not be without leave to amend unless it is clear from the face of the
23 complaint that the action is frivolous and could not be amended to state a federal claim, or the

1 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
2 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

3 **B. Plaintiff’s Complaint**

4 Plaintiff sues Mike Young and the Whitney Peak Hotel for violation of his right to the
5 freedom of speech. Plaintiff alleges that he was accused of theft from the Whitney Peak Hotel, but
6 was soon thereafter found innocent of the charges. He avers that after that his work environment
7 became hostile toward him and he felt threatened by a supervisor. He wrote a personal review
8 about his work environment and conditions on Yelp, and the next day Mike Young called him to
9 his office and he was fired for posting the Yelp review. (ECF No. 5-1.)

10 The First Amendment protects people against government, but not *private*, infringement
11 of free speech rights. *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1229 (9th Cir. 1996).
12 Nor do Plaintiff’s allegations give rise to an employment law claim under Title VII of the Civil
13 Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex and
14 national origin. Plaintiff states vaguely that he was subject to harassment after he was cleared of
15 the theft charges, but his allegations do not implicate one of the protected areas under Title VII.

16 It is not completely apparent that Plaintiff cannot state any viable claim; therefore, this
17 action will be dismissed with leave to amend.

18 **III. CONCLUSION**

19 (1) Plaintiff’s IFP application (ECF No. 5) is **GRANTED**; however, within **30 DAYS**
20 Plaintiff must pay, through NDOC, an initial partial filing fee in the amount of \$7.24. Thereafter,
21 whenever his prison account exceeds \$10, he is required to make monthly payments in the amount
22 of 20 percent of the preceding month’s income credited to his account until the full \$350 filing fee
23 is paid. This is required even if the action is dismissed, or is otherwise unsuccessful. The Clerk

1 must **SEND** a copy of this Order to the attention of **Chief of Inmate Services for the Nevada**
2 **Department of Corrections**, P.O. Box 7011, Carson City, Nevada 89702.

3 (2) The Clerk will **FILE** the complaint (ECF No. 5-1).

4 (3) The Complaint is **DISMISSED WITH LEAVE TO AMEND**.

5 (4) Plaintiff has **30 DAYS** from the date of this Order to file an amended complaint
6 correcting the deficiencies noted above. The amended complaint must be complete in and
7 of itself without referring or incorporating by reference any previous complaint. Any
8 allegations, parties, or requests for relief from a prior complaint that are not carried
9 forwarded in the amended complaint will no longer be before the court. Plaintiff shall
10 clearly title the amended pleading as "AMENDED COMPLAINT." If Plaintiff fails to file
11 an amended complaint within the 30 days, the action may be dismissed.

12 (5) The motions for appointment of counsel (ECF Nos. 1-2, 5-2) are **DENIED WITHOUT**
13 **PREJUDICE**.

14 **IT IS SO ORDERED.**

15 Dated: March 17, 2020.

16 William G. Cobb

17 William G. Cobb
18 United States Magistrate Judge
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